

Derek A. Newman, State Bar No. 190467  
derek@newmanlaw.com  
Keith Scully, Admitted Pro Hac Vice  
NEWMAN DU WORS LLP  
1201 Third Avenue, Suite 1600  
Seattle, WA 98101  
Telephone: (206) 274-2800  
Facsimile: (206) 274-2801  
Attorneys for Movant John Doe

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

JOHN DOE,

Movant,

v.

SECURITIES AND EXCHANGE  
COMMISSION of the UNITED STATES,

Respondent.

No. 3:11-mc-80208-CRB

MOTION FOR DE NOVO  
DETERMINATION<sup>1</sup> OF  
DISPOSITIVE MATTER  
REFERRED TO MAGISTRATE  
JUDGE

The Honorable Charles R. Breyer  
Date: November 18, 2011  
Time: 10:00 a.m.  
Location: Courtroom 6, 17<sup>th</sup> Floor

NOTICE IS HEREBY GIVEN that on November 18, 2011, at 10:00 a.m., in the courtroom of the Honorable Charles R. Breyer, Movant John Doe will and hereby does move the Court to modify the October 4, 2011 Order Denying Motion to Quash Subpoena of Magistrate Judge Nandor Vadas.

<sup>1</sup> L.R. 72 provides for different mechanisms for review of a dispositive and nondispositive order from a magistrate. It is Movant's position that the Magistrate's order is dispositive, because it disposes of the sole issue in this miscellaneous case: whether Google must comply with the SEC's subpoena. However, because the Magistrate captioned his ruling as a nondispositive Order rather than a dispositive Findings and Conclusions, this Motion complies with the length and other requirements of L.R. 72(a), governing nondispositive rulings.

**I. INTRODUCTION, RELIEF REQUESTED, AND ISSUE PRESENTED**

Free speech protection extends to the right to speak anonymously over the Internet. In order to overcome Doe's constitutional right to anonymous free speech and discovery Doe's identity from Google's Gmail service through a subpoena, the SEC must demonstrate that discovery of Doe's identity is rationally related to a compelling governmental interest. The SEC produced only conclusory statements that securities violations might have occurred in connection with communications regarding a company's stock, without providing any evidence supporting its claims or proving that Doe's Gmail address was connected to lawbreaking. Did the Magistrate err in concluding that the SEC produced sufficient evidence to support its subpoena?

**I. STATEMENT OF FACTS**

Doe is the owner of <marketingacesinc@gmail.com>, a free online email address provided by Google. (Dkt No. 3, Declaration of John Doe in Support of Motion to Quash ("Doe Decl.") at ¶ 3.) Doe uses <marketingacesinc @gmail.com> to communicate anonymously over the Internet, including publishing his free-speech protected opinions in online fora. (*Id.*) Doe has chosen not to use his real name, or publish his identifying information, in connection with <marketingacesinc @gmail.com> in order to protect his privacy. (Doe Decl. at ¶ 4.)

On August 1, 2011, Google sent an email to Doe indicating that Google received an administrative subpoena from the SEC. (Doe Decl. at ¶ 6.) The subpoena demands that Google identify Doe and produce all communications between Google and Doe. (Doe Decl. at ¶ 7, Exh. A.) The subpoena indicates that it was issued as part of the SEC's "Jammin Java" investigation. (*Id.*)

Doe moved to quash. In opposition to Doe's motion, the SEC produced only its Order Directing Private Investigation in the Jammin Java matter (the "Jammin Java Order"), a declaration from its attorney, a chart showing the Jammin Java company's

1 stock price, and the Jammin Java corporation's SEC quarterly report. (Dkt. No. 11,  
2 Response re Motion to Quash ("SEC's Response") and attachments.)

3  
4 The Jammin Java Order is a total of three pages long. (SEC's Response at Exh. 1,  
5 Att. A) It recites the language of the Securities Act of 1933, and conclusorily alleges that  
6 certain persons may have violated it. (*Id.*) It contains no factual information, including  
7 no information on the source of the SEC's belief, and no details on how or when the  
8 Securities Act might have been violated. (*Id.*) Neither Doe nor the <marketingacesinc  
9 @gmail.com> email account is mentioned. (*Id.*) Similarly, the declaration from the  
10 SEC's attorney conclusorily states that the "SEC has obtained information indicating that  
11 the email address 'marketingacesinc@gmail.com' potentially belongs to a touter" in the  
12 Jammin Java "scheme," without providing any supporting evidence. (SEC's Response at  
13 Att. 1).

14 On October 4, 2011, Magistrate Judge Nandor Vadas denied Doe's motion to  
15 quash. (October 4, 2011 Order Denying Motion to Quash Subpoena ("Order")).

## 16 II. AUTHORITY

### 17 18 A. The Magistrate erred by finding that Doe's right to anonymous speech was 19 not implicated by the SEC's subpoena.

20 Doe bore the initial burden of demonstrating that the SEC's subpoena invaded a  
21 protected interest. *Brock v. Local 375, Plumbers Int'l Union of Am., AFLCIO*, 860 F.2d  
22 346, 349 (9th Cir. 1988). The Magistrate erred by finding that Doe had not done so by  
23 invoking his right to anonymous free speech. Order, at p. 4:24-5:4. In *Anonymous Online*  
24 *Speakers v. United States Dist. Court* (In re Anonymous Online Speakers), 2011 U.S.  
25 App. LEXIS 487 at \* 6 (9th Cir. Jan. 7, 2011), the 9<sup>th</sup> Circuit held that "online speech  
26 stands on the same footing as other speech" and that identifying an anonymous Internet  
27 speaker invoked constitutional protections. The Magistrate erroneously relied on pre-  
28 *Anonymous Online Speakers* authority to conclude that revelation of Doe's Gmail

1 subscriber information did not invade his protected speech rights. But the subscriber  
 2 information to a Gmail account identifies the speaker that uses the account, and Doe's  
 3 right to remain anonymous is implicated by a subpoena discovering that information.

4 **B. The Magistrate erred in concluding that the SEC proved that discovering**  
 5 **Doe's identity was rationally related to a compelling governmental interest.**

6 Once Doe has identified a protected interest, the SEC bears the burden of proving  
 7 that its interest outweighs Doe's constitutional rights. *Perry v. Schwarzenegger*, 591 F.3d  
 8 1147, 1161 (9th Cir. 2010). The SEC claims that Doe's Gmail address may have been  
 9 involved in a "pump and dump" scheme with the Jammin Java coffee corporation.  
 10 (SEC's Response at 2:5-24). In order to prove that a violation of the Securities Act has  
 11 occurred under the SEC's "pump and dump" theory, the SEC had to prove that false and  
 12 misleading statements about Jammin Java were made to the marketplace. *United States v.*  
 13 *Zolp*, 479 F.3d 715, 717 n.1 (9<sup>th</sup> Cir. 2007). The SEC did not produce any statements that  
 14 it alleged were false. It admitted that it was "still in the process of determining what  
 15 federal securities laws violations, if any, have even been committed and by whom."  
 16 (SEC's Response at 7:22-24.)

17 The SEC's evidence is solely that the Jammin Java company's stock rose and then  
 18 fell at the same time that the Internet communications regarding the company were made,  
 19 and that Jammin Java filed documents indicating it had an intellectual property asset and  
 20 a coffee farm, but had yet to produce any coffee. (SEC's Response at 2:8-13.) A rise and  
 21 fall of stock in a new company with a valuable intellectual property asset occurs  
 22 continually in the market, and is not alone evidence of fraud. Moreover, it is not illegal to  
 23 send communications about a new company with a valuable and as-yet untapped asset.  
 24 Moreover, the SEC's only admissible evidence supporting its claim that Doe's account  
 25 was involved was its attorney's conclusory statement.

26 **C. The Magistrate erred by failing to apply the *Anonymous Online Speakers* test.**

27 The Magistrate correctly held that *Brock v. Local 375, Plumbers Int'l Union*, 860  
 28 F.2d at 349, mandates that the SEC demonstrate that its administrative subpoena is

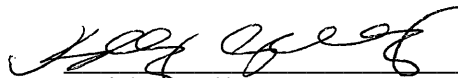
rationally related to a compelling governmental interest. Order at 6:9-10. Under any reading of *Brock*, the SEC's evidence fails. But the Magistrate further erred by failing to apply the *Anonymous Online Speakers* test for discovery of anonymous Internet identities via a subpoena, holding that *Anonymous Online Speakers* and its progeny were limited to civil discovery subpoenas and not administrative subpoenas. *Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487. But the tests for administrative subpoenas and civil discovery subpoenas are the same. *e.g.*, *Perry v. Schwarzenegger*, 591 F.3d 1147, 1161 (9th Cir. 2010)(Applying *Brock* to a civil discovery subpoena). The SEC must demonstrate, with evidence sufficient to defeat a motion for summary judgment,<sup>2</sup> that it has a valid legal basis for investigation, prove that Doe's identity is necessary to that investigation, and prove that the harm to Doe's rights is outweighed by investigative needs. *Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487.

### III. CONCLUSION

The SEC may only invade Doe's First Amendment rights after demonstrating that it has a legal basis to do so. The SEC has presented insufficient information justifying the June 21, 2011 Subpoena, and the subpoena should be quashed.

Dated: October 6, 2011

**NEWMAN DU WORS LLP**

  
 Keith Scully  
 Attorneys for Movant John Doe

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<sup>2</sup> The 9<sup>th</sup> Circuit found no clear error in the District Court's application of the summary judgment standard. *Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487 (9th Cir. Jan. 7, 2011).